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Supreme Court, U.S.
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No. 95-471

IN THE

Supreme Court of the United States

October Term, 1995

NORTHERN TELECOM INC.,
a Delaware corporation,

Petitioner,.

v.

UNITED STATES OF AMERICA *EX REL.*
THEODORE R. ANDERSON,

Respondent.

On Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF IN RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

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Anderson does not oppose NTI's Petition for Writ of Certiorari. Simultaneous with the filing of this Response, Anderson is himself filing a Cross-Petition for Writ of Certiorari with respect to issues raised by the Ninth Circuit's dismissal of one of Anderson's claims. Anderson requests that the Court grant both NTI's Petition and Anderson's Cross-Petition. Nonetheless, this Response is submitted in compliance with Respondent's obligation under Supreme Court Rule 15 to address any perceived misstatements of fact or law set forth in the Petition which may have a bearing on the question of what issues would properly be before the Court if certiorari were granted.

Anderson does not agree with Petitioner's phrasing of the questions presented by this case. Petitioner's first question focuses on the retroactivity analysis set forth in *Landgraf v. USI Film Products* 114 S. Ct. 1483 (1994). In the case at bar the Ninth Circuit did not engage in "retroactivity" analysis or apply law "retroactively." Instead, the Ninth Circuit determined that the statutory amendment at issue was to be applied prospectively. Petitioner's second question implies that the Ninth Circuit's decision altered pre-existing substantive rights of the Petitioner. However, as the Court of Appeals noted the statutory amendment did not change the legal consequences of Northern Telecom's conduct:

> If Northern Telecom really did submit a fraudulent claim, it became liable and remained liable to the government and to potential *qui tam* relators. Congress changed the consequences of Mr. Anderson's conduct, not Northern Telecom's, in 1986.

Petitioner's App., p. 7a.

In its Reasons for Granting the Writ, Petitioner wrongly contends that the Ninth Circuit's decision in the case at bar is irreconcilable with the decision of the Sixth Circuit in *United States v. T.R.W., Inc.*, 4 F.3d 417 (6th Cir. 1993), *cert. denied*, 114 S. Ct.. 1370 (1994). The Ninth Circuit accurately distinguished *TRW*, stating:

> In *T.R.W.*, the relator disclosed the false claim before the 1986 amendment saved him from the jurisdictional bar, while in the present case, the relator did not make his disclosure until after the amendment expanded jurisdiction. In the case at bar we do not reach the question of whether the amendment applies retroactively.

> We assume without deciding that the amendment is prospective in its effect, as the Sixth Circuit held.

Petitioner's App., p. 7a.

Similarly, in attacking the distinction drawn by the Ninth Circuit between this case and *TRW*, Petitioner wrongly claims that the reasoning of the *Anderson* panel was "quickly abandoned by the Ninth Circuit in two subsequently decided cases, *United States ex rel. Lindenthal v. General Dynamics Corp.*, 61 F.3d 1402 (9th Cir. 1995), and *United States ex rel. Schumer v. Hughes Aircraft Co.*, [63 F.3d 1512] 1995 WL 502989 (9th Cir. Aug. 22, 1995)." Petition, p. 20.

In both *Lindenthal* and *Schumer*, the Ninth Circuit accurately laid out the factual distinctions which precluded following the reasoning set forth in *Anderson*. As stated in *Lindenthal*:

> The *Anderson* panel . . . avoided the key inquiry under *Landgraff* because application of the new law to the case at hand did not constitute application of conduct that had occurred prior to 1986. In this case, by contrast, the government did have the information forming the basis of the claim prior to the enactment of

> the amendments, and there is no relevant post-amendment conduct that might allow us to say our application of the new law is prospective only. We therefore cannot avoid deciding whether the new provision is 'retroactive' simply by focusing on an event such as disclosure that occurred after the amendments. Instead, we directly face the question whether Section 3730(e)(4)(A) should apply retrospectively.

61 F.3d at 1408. Similarly, in *Schumer*, the Court of Appeals explained:

> Because the government allegedly became aware of the allegations through the 1986 government audit, which pre-dated the 1986 amendments, this case differs from the *United States ex rel. Anderson vs. Northern Telecom, Inc.*, 52 F.3d 810, 814 (9th Cir. 1995), in which we declined to consider the retroactivity of the jurisdictional bar because the relator's disclosure to the government occurred after 1986.

63 F.3d at 1517, fn. 1.

While Respondent has further disagreement with the argument and the rhetoric contained in the Petitioner's Writ, these disagreements are more appropriately reserved for the briefs on the merits should the Writ be granted.

October 25, 1995

Respectfully submitted,

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